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THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

Comments and observations received from States

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* The reply submitted jointly by Denmark, Finland, Iceland, Norway and Sweden is reproduced under Nordic countries.

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INTRODUCTION

1. At its forty-third session, held in 1991, the International Law Commission adopted on first reading a set of draft articles on the law of the non-navigational uses of international watercourses. The Commission decided that, in accordance with articles 16 and 21 of its statute, these draft articles should be transmitted through the Secretary-General to Governments for comments and observations and that it should be requested that such comments and observations and that it should be requested that such comments and observations be submitted to the Secretary-General by 1 January 1993. 1/

2. By paragraph 9 of resolution 46/54 of 9 December 1991, and again by paragraph 12 of resolution 47/33 of 25 November 1992, both relating to the report of the International Law Commission, the General Assembly drew the attention of Governments to the importance, for the Commission, of having their views on the draft articles on the Law of the non-navigational uses of international watercourses, adopted on first reading by the Commission, and urged them to present in writing their comments and observations by 1 January 1993, as requested by the Commission.

3. Pursuant to the Commission's request, the Secretary-General addressed to Governments circular letters dated 20 December 1991 and 1 December 1992 respectively, inviting them to submit their comments and observations by 1 January 1993.

4. As of 3 March 1993, the Secretary-General had received 14 replies from Member States and one from a non-member State, the texts of which appear in the present document. Replies received subsequent to the above-mentioned date will be included in addenda to the present document.

5. For the convenience of the reader, the text of the draft articles adopted by the Commission on first reading is reproduced below.

1/ Official Records of the General Assembly, Forty-sixth Session, Supplement No. 10 (A/46/10), para. 58.

DRAFT ARTICLES ON THE LAW OF THE NON-NAVIGATIONAL USES OF INTERNATIONAL WATERCOURSES

PART I

INTRODUCTION

Article 1

Scope of the present articles

1. The present articles apply to uses of international watercourses and of their waters for purposes other than navigation and to measures of conservation related to the uses of those watercourses and their waters.

2. The use of international watercourses for navigation is not within the scope of the present articles except in so far as other uses affect navigation or are affected by navigation.

Article 2

Use of terms

For the purposes of the present articles:

(a) "international watercourse" means a watercourse, parts of which are situated in different States;

(b) "watercourse" means a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus;

(c) "watercourse State" means a State in whose territory part of an international watercourse is situated.

Article 3

Watercourse agreements

1. Watercourse States may enter into one or more agreements, hereinafter referred to as "watercourse agreements", which apply and adjust the provisions of the present articles to the characteristics and uses of a particular international watercourse or part thereof.

2. Where a watercourse agreement is concluded between two or more watercourse States, it shall define the waters to which it applies. Such an agreement may be entered into with respect to an entire international watercourse or with respect to any part thereof or a particular project,

programme or use, provided that the agreement does not adversely affect, to an appreciable extent, the use by one or more other watercourse States of the waters of the watercourse.

3. Where a watercourse State considers that adjustment or application of the provisions of the present articles is required because of the characteristics and uses of a particular international watercourse, watercourse States shall consult with a view to negotiating in good faith for the purpose of concluding a watercourse agreement or agreements.

Article 4

Parties to watercourse agreements

1. Every watercourse State is entitled to participate in the negotiation of and to become a party to any watercourse agreement that applies to the entire international watercourse, as well as to participate in any relevant consultations.

2. A watercourse State whose use of an international watercourse may be affected to an appreciable extent by the implementation of a proposed watercourse agreement that applies only to a part of the watercourse or to a particular project, programme or use is entitled to participate in consultations on, and in the negotiation of, such an agreement, to the extent that its use is thereby affected, and to become a party thereto.

PART II

GENERAL PRINCIPLES

Article 5

Equitable and reasonable utilization and participation

1. Watercourse States shall in their respective territories utilize an international watercourse in an equitable and reasonable manner. In particular, an international watercourse shall be used and developed by watercourse States with a view to attaining optimal utilization thereof and benefits therefrom consistent with adequate protection of the watercourse.

2. Watercourse States shall participate in the use, development and protection of an international watercourse in an equitable and reasonable manner. Such participation includes both the right to utilize the watercourse and the duty to cooperate in the protection and development thereof, as provided in the present articles.

Article 6

Factors relevant to equitable and reasonable utilization

1. Utilization of an international watercourse in an equitable and reasonable manner within the meaning of article 5 requires taking into account all relevant factors and circumstances, including:

(a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character;

(b) the social and economic needs of the watercourse States concerned;

(c) the effects of the use or uses of the watercourse in one watercourse State on other watercourse States;

(d) existing and potential uses of the watercourse;

(e) conservation, protection, development and economy of use of the water resources of the watercourse and the costs of measures taken to that effect;

(f) the availability of alternatives, of corresponding value, to a particular planned or existing use.

2. In the application of article 5 or paragraph 1 of this article, watercourse States concerned shall, when the need arises, enter into consultations in a spirit of cooperation.

Article 7

Obligation not to cause appreciable harm

Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States.

Article 8

General obligation to cooperate

Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.

Article 9

Regular exchange of data and information

1. Pursuant to article 8, watercourse States shall on a regular basis exchange reasonably available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological and ecological nature, as well as related forecasts.

2. If a watercourse State is requested by another watercourse State to provide data or information that is not reasonably available, it shall employ its best efforts to comply with the request but may condition its compliance upon payment by the requesting State of the reasonable costs of collecting and, where appropriate, processing such data or information.

3. Watercourse States shall employ their best efforts to collect and, where appropriate, to process data and information in a manner which facilitates its utilization by the other watercourse States to which it is communicated.

Article 10

Relationship between uses

1. In the absence of agreement or custom to the contrary, no use of an international watercourse enjoys inherent priority over other uses.

2. In the event of a conflict between uses of an international watercourse, it shall be resolved with reference to the principles and factors set out in articles 5 to 7, with special regard being given to the requirements of vital human needs.

PART III

PLANNED MEASURES

Article 11

Information concerning planned measures

Watercourse States shall exchange information and consult each other on the possible effects of planned measures on the condition of an international watercourse.

Article 12

Notification concerning planned measures with possible adverse effects

Before a watercourse State implements or permits the implementation of planned measures which may have an appreciable adverse effect upon other watercourse States, it shall provide those States with timely notification thereof. Such notification shall be accompanied by available technical data and information in order to enable the notified States to evaluate the possible effects of the planned measures.

Article 13

Period for reply to notification

Unless otherwise agreed, a watercourse State providing a notification under article 12 shall allow the notified States a period of six months within which to study and evaluate the possible effects of the planned measures and to communicate their findings to it.

Article 14

Obligations of the notifying State during the period for reply

During the period referred to in article 13, the notifying State shall cooperate with the notified States by providing them, on request, with any additional data and information that is available and necessary for an accurate evaluation, and shall not implement or permit the implementation of the planned measures without the consent of the notified States.

Article 15

Reply to notification

1. The notified States shall communicate their findings to the notifying State as early as possible.

2. If a notified State finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 or 7, it shall communicate this finding to the notifying State within the period referred to in article 13, together with a documented explanation setting forth the reasons for the finding.

Article 16

Absence of reply to notification

If, within the period referred to in article 13, the notifying State receives no communication under paragraph 2 of article 15, it may, subject to its obligations under articles 5 and 7, proceed with the implementation of the planned measures, in accordance with the notification and any other data and information provided to the notified States.

Article 17

Consultations and negotiations concerning planned measures

1. If a communication is made under paragraph 2 of article 15, the notifying State and the State making the communication shall enter into consultations and negotiations with a view to arriving at an equitable resolution of the situation.

2. The consultations and negotiations shall be conducted on the basis that each State must in good faith pay reasonable regard to the rights and legitimate interests of the other State.

3. During the course of the consultations and negotiations, the notifying State shall, if so requested by the notified State at the time it makes the communication, refrain from implementing or permitting the implementation of the planned measures for a period not exceeding six months.

Article 18

Procedures in the absence of notification

1. If a watercourse State has serious reason to believe that another watercourse State is planning measures that may have an appreciable adverse effect upon it, the former State may request the latter to apply the provisions of article 12. The request shall be accompanied by a documented explanation setting forth the reasons for such belief.

2. In the event that the State planning the measures nevertheless finds that it is not under an obligation to provide a notification under article 12, it shall so inform the other State, providing a documented explanation setting forth the reasons for such finding. If this finding does not satisfy the other State, the two States shall, at the request of that other State, promptly enter into consultations and negotiations in the manner indicated in paragraphs 1 and 2 of article 17.

3. During the course of the consultations and negotiations, the State planning the measures shall, if so requested by the other State at the time it

requests the initiation of consultations and negotiations, refrain from implementing or permitting the implementation of those measures for a period not exceeding six months.

Article 19

Urgent implementation of planned measures

1. In the event that the implementation of planned measures is of the utmost urgency in order to protect public health, public safety or other equally important interests, the State planning the measures may, subject to articles 5 and 7, immediately proceed to implementation, notwithstanding the provisions of article 14 and paragraph 3 of article 17.

2. In such cases, a formal declaration of the urgency of the measures shall be communicated to the other watercourse States referred to in article 12 together with the relevant data and information.

3. The State planning the measures shall, at the request of any of the States referred to in paragraph 2, promptly enter into consultations and negotiations with it in the manner indicated in paragraphs 1 and 2 of article 17.

PART IV

PROTECTION AND PRESERVATION

Article 20

Protection and preservation of ecosystems

Watercourse States shall, individually or jointly, protect and preserve the ecosystems of international watercourses.

Article 21

Prevention, reduction and control of pollution

1. For the purposes of this article, "pollution of an international watercourse" means any detrimental alteration in the composition or quality of the waters of an international watercourse which results directly or indirectly from human conduct.

2. Watercourse States shall, individually or jointly, prevent, reduce and control pollution of an international watercourse that may cause appreciable harm to other watercourse States or to their environment, including harm to human health or safety, to the use of the waters for any beneficial purpose or

to the living resources of the watercourse. Watercourse States shall take steps to harmonize their policies in this connection.

3. Watercourse States shall, at the request of any of them, consult with a view to establishing lists of substances, the introduction of which into the waters of an international watercourse is to be prohibited, limited, investigated or monitored.

Article 22

Introduction of alien or new species

Watercourse States shall take all measures necessary to prevent the introduction of species, alien or new, into an international watercourse which may have effects detrimental to the ecosystem of the watercourse resulting in appreciable harm to other watercourse States.

Article 23

Protection and preservation of the marine environment

Watercourse States shall, individually or jointly, take all measures with respect to an international watercourse that are necessary to protect and preserve the marine environment, including estuaries, taking into account generally accepted international rules and standards.

PART V

HARMFUL CONDITIONS AND EMERGENCY SITUATIONS

Article 24

Prevention and mitigation of harmful conditions

Watercourse States shall, individually or jointly, take all appropriate measures to prevent or mitigate conditions that may be harmful to other watercourse States, whether resulting from natural causes or human conduct, such as flood or ice conditions, water-borne diseases, siltation, erosion, salt-water intrusion, drought or desertification.

Article 25

Emergency situations

1. For the purposes of this article, "emergency" means a situation that causes, or poses an imminent threat of causing, serious harm to watercourse

States or other States and that results suddenly from natural causes, such as floods, the breaking up of ice, landslides or earthquakes, or from human conduct as for example in the case of industrial accidents.

2. A watercourse State shall, without delay and by the most expeditious means available, notify other potentially affected States and competent international organizations of any emergency originating within its territory.

3. A watercourse State within whose territory an emergency originates shall, in cooperation with potentially affected States and, where appropriate, competent international organizations, immediately take all practicable measures necessitated by the circumstances to prevent, mitigate and eliminate harmful effects of the emergency.

4. When necessary, watercourse States shall jointly develop contingency plans for responding to emergencies, in cooperation, where appropriate, with other potentially affected States and competent international organizations.

PART VI

MISCELLANEOUS PROVISIONS

Article 26

Management

1. Watercourse States shall, at the request of any of them, enter into consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism.

2. For the purposes of this article, "management" refers, in particular, to:

(a) planning the sustainable development of an international watercourse and providing for the implementation of any plans adopted; and

(b) otherwise promoting rational and optimal utilization, protection and control of the watercourse.

Article 27

Regulation

1. Watercourse States shall cooperate where appropriate to respond to needs or opportunities for regulation of the flow of the waters of an international watercourse.

2. Unless they have otherwise agreed, watercourse States shall participate on an equitable basis in the construction and maintenance or defrayal of the costs of such regulation works as they may have agreed to undertake.

3. For the purposes of this article, "regulation" means the use of hydraulic works or any other continuing measure to alter, vary or otherwise control the flow of the waters of an international watercourse.

Article 28

Installations

1. Watercourse States shall, within their respective territories, employ their best efforts to maintain and protect installations, facilities and other works related to an international watercourse.

2. Watercourse States shall, at the request of any of them which has serious reason to believe that it may suffer appreciable adverse effects, enter into consultations with regard to:

(a) the safe operation or maintenance of installations, facilities or other works related to an international watercourse; or

(b) the protection of installations, facilities or other works from wilful or negligent acts or the forces of nature.

Article 29

International watercourses and installations in time of armed conflict

International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules.

Article 30

Indirect procedures

In cases where there are serious obstacles to direct contacts between watercourse States, the States concerned shall fulfil their obligations of cooperation provided for in the present articles, including exchange of data and information, notification, communication, consultations and negotiations, through any direct procedure accepted by them.

Article 31

Data and information vital to national defence or security

Nothing in the present articles obliges a watercourse State to provide data or information vital to its national defence or security. Nevertheless, that State shall cooperate in good faith with the other watercourse States with a view to providing as much information as possible under the circumstances.

Article 32

Non-discrimination

Watercourse States shall not discriminate on the basis of nationality or residence in granting access to judicial and other procedures, in accordance with their legal systems, to any natural or juridical person who has suffered appreciable harm as a result of an activity related to an international watercourse or is exposed to a threat thereof.

I. COMMENTS AND OBSERVATIONS RECEIVED FROM MEMBER STATES

COSTA RICA

[Original: Spanish]

[1 September 1992]

We have great pleasure, first, in noting that the draft is a remarkable achievement, not only as regards the regulation as such of the non-navigational uses of watercourses but also as regards its compatibility with the work accomplished in various forums through various instruments in respect of environmental protection, and thus with the broad outlines set out in that connection in the Convention on the Law of the Sea, by whose regime and terminology the draft is frequently inspired.

Secondly, praise is also due to tho work of the group responsible for the drafting, whose commentaries, based on wide-ranging comparative doctrine and case-law, serve as guidelines for interpreting the scope of the proposed articles.

In this field, where the task is to elucidate and refine existing rules, thus progressively developing watercourse law, the draft is remarkable for a constant search for balance and negotiated solutions tailored to the reality of the various relationships involved.

It is my Government's intention to welcome and support the work of the group of the International Law Commission responsible for preparing the draft articles. In so doing, we are reaffirming the spirit which led Costa Rica to ratify the 1982 Convention on the Law of the Sea, as well as its devotion to and profound respect for international law.

Notwithstanding the foregoing and in the light of the interest aroused by the draft articles, may I take this opportunity to convey to you a few brief concerns or reflections regarding the regime envisaged by the Commission.

I. The first of these ensues from the definition of "international watercourse" itself.

As we understand it, the draft makes the international character of a watercourse dependent solely on physical and not political criteria. Thus, a watercourse is international when parts of it are situated in different States (art. 2 (a)). Consequently, a "watercourse State" is that State in whose territory part of an international watercourse is situated (para. (c)).

The Commission states in its commentary that the most common examples of an international watercourse would be a river that forms or crosses a boundary.

Could this concept be construed in such a way as to change the nature of a river which has been designated by a treaty as serving as a boundary between

two countries but is recognized as belonging to only one of them? In other words, could a boundary river, formally subject to the territorial sovereignty of one State but also subject to a regime whereby it is freely navigable at all times by another State, be regarded, because it is a boundary, and because two neighbouring States have ratified a convention of this kind, as an "international watercourse" for the different purposes of these draft articles?

Would the watercourses of the other State which feed the boundary river be regarded, because they flow into it, as international when they enter waters whose territorial sovereignty resides with the bordering neighbour State?

Would the proportion of a watercourse which penetrates or infiltrates the boundaries of another State have no effect on whether it was regarded as international or not?

Let us suppose that there is a medium-sized river whose channel runs for the most part in State X but whose lower reaches cross a certain portion, not very large, of the territory of a neighbouring State and from there drain into that State's tributaries, lakes and other watercourses. Would the circumstance of crossing a small part of the territory of a neighbouring State and flowing into its waters be sufficient to qualify that entire river or tributary as an "international watercourse"?

If the reply was in the affirmative, would this reasoning not make it possible to extend the character of "international" to the watercourse into which our hypothetical rivers flow, in so far as these form a water system "constituting a unitary whole and flowing into a common terminus" (art. 2, para. (b))?

What is the bearing on all this of the distinction made by the Commission, for the purposes of applying the regime envisaged in the draft articles, between watercourses and their waters (art. 1, para. 1)?

Attention may also be drawn to a number of other questions which though different are closely linked to the preceding.

II. Would an eventual ratification of an instrument of this kind be accompanied by a declaration indicating the rivers to which the States intend to apply the regime envisaged in it?

III. Does the criterion of the residual character of the draft convention, as established in its articles 2 and 3 particularly, continue to apply in respect of pre-existing agreements? 1/

IV. To what extent, from the sole fact of subscribing to a convention of this kind, and in the absence of any declaration indicating the watercourses to which an eventual convention would apply, would it be possible for these watercourses to be used for non-navigational purposes while the existing regime governing them refers only to navigation?

V. Although it is true that many of the rules in the draft articles belong in the category regarded as soft law 2/ which is dependent on subsequent specific regulations, it is also true that a regime of responsibility emerges from this framework instrument. However, as is frequently the case in international law, although the principle of responsibility is established, it is not reinforced by any penalty regime. Is there no possibility of establishing such a regime?

Further, would the regime of responsibility be extended to the management of the waters of tributaries of an international watercourse? We know that the draft articles take as their starting-point the concept of a system to cover the aspects of environmental protection. Does the indirect contamination of watercourses through the contamination of tributaries involve responsiblity on the part of the State in which these are situated? Would failure to protect the land and forests of the basins referred to by the draft articles constitute a fault on the part of the State in which these are situated?

VI. Do not the procedural aspects of the draft articles, such as those established in the rule on non-discrimination in article 32, need to be revised or made more specific, as is done in the case of article 3 of the Convention on the Protection of the Environment, concluded among the Scandinavian countries on 19 February 1974, on which article 32 is based?

VII. Lastly, in our view, a body of provisions on the peaceful settlement of disputes is absolutely indispensable.

We hope that the concerns outlined above will serve to encourage the International Law Commission to continue its work which has already produced fruitful results.

1/ According to well-known principles of law, a later rule takes precedence over an earlier one, and the special over the general provision. However, in this field, where innovations are also taking place, these principles may not be sufficient and it may be necessary to combine them with the principle governing the relationship between principal and residual rules.

2/ General and flexible rules.

DENMARK

[See Nordic countries]

FINLAND

[see Nordic countries]

GERMANY

[Original: English]

[11 January 1993]

1. Germany welcomes the provisional adoption by the International Law Commission (ILC) of a convention on the non-navigational uses of international watercourses. Germany attaches particular importance to the subject of this convention, not only because of its geographical situation in the centre of Europe, but especially in view of the fact that it shares several major international watercourses. Germany is of the opinion that the draft convention also meets a global need for regulation in this matter. This is due to the fact that since the Second World War the general use of watercourses has been the focal point of attention while navigational needs have been pushed into the background.

For this reason the German Government is pleased to note that the ILC has reacted positively to the special challenge arising from the increased global demand for water over the past decades and the enormous level of water utilization. Germany welcomes the fact that the ILC, from the start, considered other instruments of international law with a similar aim in formulating this draft convention. Germany supports the basing of the convention on existing regulations, particularly on regional agreements for the protection of specific watercourses, as this serves to create a highly comprehensive framework of complementary global and regional regimes for international watercourses.

2. Germany supports the draft convention's underlying concept of a framework agreement for various reasons. On the one hand, this approach does not deny the contracting parties the opportunity to deal with the specific characteristics and use of a certain international watercourse by means of bilateral and multilateral agreements. On the other hand, it supplies them with general principles and thus establishes a minimum standard. In addition, it fills a regulatory gap for all those cases of international watercourses for which there are as yet no binding agreements.

3. Germany makes the following comments and observations regarding the draft convention:

The fact that the draft convention now begins with a clear statement as to the scope of its application (art. 1, para. 1) is to be welcomed. The German Government regards the exception made in article 1, paragraph 2, i.e., that navigational use falls within the scope of the convention in so far as this use affects or is affected by the use described in paragraph 1, as appropriate and not in conflict with the primary content of the regulation. The formula "international watercourses and waters" rightly makes it clear that, for example, in the case of a river the regulation is not limited to the river bed. It thus serves to avoid misunderstanding.

Another positive feature is that the ILC has dropped the idea of a "relative international character of watercourses" (art. 2 (a)). This would merely have led to misinterpretations of the individual articles. The adoption of the concept of "watercourse systems" makes it clear that the use of all components of this system must be regulated so that it would not adversely affect other watercourse States or the watercourse itself.

It is a good sign that the concept of "international watercourse systems" has been adopted in the draft convention. The definition of watercourses as a system including surface water and groundwater corresponds to the idea, supported by Germany, of providing the most comprehensive and effective watercourse protection possible. This broad approach is in line with physical and hydrologic reality. Thus, tributary watercourses far from State boundaries can be included, with the result that the waters in these remote areas fall within the framework of the draft convention. However, this common area is limited by the fact that the watercourses have a "common terminus". The significance of the inclusion of groundwater - except for "confined groundwater" - becomes particularly obvious when one bears in mind the fact that, as part of the hydrologic cycle, it feeds the watercourses. The ILC was right not to include "confined groundwater" as it has no physical relationship to surface water and thus does not form part of a whole in need of protection. For this reason it was vitally necessary to replace the term "watercourse" by that of "watercourse system" in order to take into account the idea of the best possible use of a watercourse as a common resource using environmental criteria.

Regarding article 3, which codifies the framework character of the draft convention, paragraph 2, sentence 2, is particularly significant; it makes clear that agreements concerning international watercourses must always consider their use by all watercourse States, even if they are not participants in the negotiations. Thus the situation in which a few States agree on the use of the water at the expense of others is rightly avoided.

Germany welcomes the fact that article 4 makes it clear who can become party to a watercourse agreement. Paragraph 2 can be positively singled out since it ensures that an agreement at the expense of a third party is not possible when it is affected to an "appreciable extent", even if the watercourse agreement applies to only part of an international watercourse.

Germany supports the principle of "equitable utilization" or "equitable apportionment" laid down in article 5, which should ensure that the use of a watercourse by several States leads to optimum utilization and at the same time minimum limitation of other States' rights to utilize the water (cf art. 5, para. 1, sentence 2). Thus the fact that article 5 contains both a right to utilize the water and a duty not to limit other States in their right to equitable utilization of that water is welcomed by Germany. The concept of "equitable participation" embodied in article 5, paragraph 2, ensures the goal of optimum utilization, which is only possible when the watercourse States cooperate by participating in the protection and development of the watercourses.

Article 6 contains an important aid to interpretation in deciding what constitutes "equitable and reasonable" use. It describes the main factors, although the list is not exhaustive, which is only natural in view of the framework character of the convention. As the possibility of a dispute concerning the interpretation of this most important undefined legal term (equitable and reasonable utilization) cannot be ruled out, paragraph 2 obliges the parties to enter into consultations in a spirit of cooperation, thus repeating a basic principle contained in many international conventions.

Article 7, which establishes the level of protection, is the central element of the draft convention. It is especially important when formulating this article to strike a fair balance between conflicting interests. Thus, on the one hand, the principle of good-neighbourliness means that States must tolerate, as part of "normal relations between States", limited effects on their territory that cause irritation rather than actual physical damage. Even if one considers the rule of common use and the compatibility of all such use, it would thus be excessive and contrary to international practice to forbid all damaging effects upon other riparian States, however small. On the other hand, one has to bear in mind that today the danger to international watercourses through pollution, warming, etc., mostly stems from a number of users who, from their own point of view, do not cause grievous harm to the watercourse or damage to other States sharing that watercourse. Only when taken <u>in toto</u> does this damage become "serious" or "grave" for the international watercourse itself and other riparian States. For this reason we must agree with the Special Rapporteur and the majority of the ILC members when they reject a level of protection described as "serious" or "grave".

The term "appreciable" used in the draft convention has the disadvantage of having a double meaning. "Appreciable" may mean "detectable" or "significant" in connection with risk or harm. As this double meaning involves considerable differences in substance, we suggest that the term "significant" be used, especially as this also corresponds to the ILC's interpretation of "appreciable". Thus "appreciable" should be replaced by "significant" in article 7. Similar changes should be made in articles 3, 4, 12, 18, 21, 22, 28 and 32.

Regarding the relationship between articles 5 and 7, Germany would suggest considering ILC's appropriate commentary to the effect that any "appreciable" or, as we suggest, "significant" damage constitutes a violation

of the principle of equitable and reasonable utilization pursuant to article 5 should be explicitly included in the convention for the sake of clarity.

Germany welcomes the fact that article 8, which regulates the general principles and objectives of cooperation between watercourse States, contains such long-recognized formulas as "sovereign equality, territorial integrity, mutual benefit".

Germany also supports the procedural obligation codified in article 9 of the States to inform and consult each other in good time when planning watercourse utilization. This obligation has rightly featured in numerous treaties concerning water and river use and results from the material legal duty to avoid doing anything which might lead to serious damage to another State. We regard the regular exchange of information as particularly important for the effective protection of international watercourses.

Article 10 rightly says that no use of an international watercourse has priority over another in the absence of agreements to the contrary.

We agree with the fact that articles 11 to 19 envisage a highly detailed process for "planned measures", in which the positions and possible objections of watercourse States are considered when a project is to be taken in hand which might have an "appreciable adverse effect" on these States (art. 12). The process for the "planned measures" contains elements of international environmental impact studies.

We welcome the fact that by means of binding waiting periods of one year at most (art. 13, art. 15, para. 2, art. 17, paras. 1 and 3), the obligation to consult and negotiate is also procedurally guaranteed. While this entails quite considerable interference for the riparian State wishing to carry out the project, the exceptions made in the case of urgent projects, in article 19, supply the necessary balance. In addition, exhaustive national planning procedures where citizens' views are aired (for instance, the environmental impact study) are usually also envisaged for the projects, with the result that delays due to affected riparian States being involved at the same time are unlikely.

However, the detailed process for "planned measures" can only be of assistance in the case of "large-scale" projects; the damage caused to international watercourses by cumulative pollution on the part of several introducers is not covered by the above regulations.

Germany attaches great importance to articles 20 to 25 of the draft convention, which deal on the one hand with environmental protection and on the other hand with harmful conditions and emergency situations connected with the utilization of international watercourses. As has already been mentioned, the Federal Republic of Germany, as a country sharing several large international watercourses, has a particular interest in developing international law in this area. This is especially true of the formulation of rules for environmental protection.

Important environmental law principles, such as the demand for use and development of international watercourses which is in keeping with their adequate protection (art. 20) or the listing of certain substances with the aim of preventing their introduction into certain media (art. 21, para. 3), rightly feature in these articles. It should, however, be more clearly stated what constitutes pollution according to article 21. International watercourses can only be protected on a long-term basis if the grave danger of damage by pollution is avoided. In order to do this we need a definition of pollution which goes beyond article 21, paragraph 1. The 1982 Convention on the Law of the Sea in its article 1, paragraph 1, subparagraph 4, contains such a definition which has been widely recognized and which should be incorporated in this convention. Article 22 innovatively deals with the introduction of "new" animal and plant species into international watercourses. We welcome article 23, which states that rivers should not be freed from pollution at the expense of the seas. The reduction of polluion in the seas, especially in the North and Baltic seas, due to land-based sources is particularly important to Germany, since rivers play the largest role in sea pollution.

Finally, we regard the wide range of responsibility in article 24 as positive, as well as the States' obligation to cooperate with non-party States in emergency situations.

In the final section (arts. 26-32) we particularly welcome the regulation on non-discrimination (art. 32). This is in keeping with our understanding of the law and recent trends in international environmental policy. Because of the highly successful treatment of the Rhine, which was due in no small measure to the excellent work of the International Commission for the Protection of the Rhine, Germany would welcome greater emphasis being placed upon the aspect of the joint management of international watercourses. Thus, for example, article 26 could be taken out of what was part IV and moved up in the text to a prominent position. In order to specify the meaning of "joint management" in an institutionalized form, the clauses of article 26 could be extended, based on the principles of article 10, paragraph 2.

4. The 32 articles in this draft convention constitute a balanced set of rules. They guarantee effective river protection and supply a framework for more specific bilateral or regional watercourse agreements. All the main principles of international environmental law have been taken into account, such as that of limited territorial sovereignty, the ban on abuse of right recognized in international law pertaining to State responsibility and the procedural obligation to supply information in good time and to consult other parties when planning utilization, documented above all with regard to the use of water within an international drainage basin.

5. Germany would welcome an early diplomatic conference for the purpose of adopting the draft convention.

GREECE

[Original: French]

[3 February 1993]

The provisions of the draft articles are generally acceptable to the Government of Greece. The draft manages, on the whole, to reconcile the opposing rights and interests in this field - those of upstream countries, on the one hand, and those of downstream countries, on the other. The draft is thus on the right track and constitutes an excellent basis for future work.

The Government of Greece notes that the Commission has adopted, in draft article 2, the concept of a system in relation to international watercourses. However, it would have preferred the adoption of the modern concept of international catchment area, which is, from the scientific point of view, more comprehensive and more sound.

A positive point, however, is the fact that the underground waters of a system have been included within the scope of the draft articles.

Article 7 lays down the obligation not to cause "appreciable harm". In the view of the Greek Government, the term "perceptible harm" would have been preferable, as it more closely reflects current practice in this regard. This also applies to the other draft articles in which this term appears.

Articles 5 and 6 can be considered the keystone of the draft articles, for in reality they determine the conduct of watercourse States with respect to the utilization of a watercourse in their respective territories. Such utilization must be equitable and reasonable. The use of the notion of equity in connection with relations involving international watercourses is entirely apposite. It should be emphasized, however, that equity is not somethng that is outside the scope of the law, a sort of solution ex aequo et bono, but rather it is a legal standard imposed by customary international law. Equity is, therefore, a verifiable concept, meeting the specific criteria which are listed in article 6.

With regard to article 10, which deals with the relationship between uses, the Government of Greece maintains that, especially in the case of small rivers, account should be taken, even if only by way of exception, of certain specific interests, such as protection of public health and preservation of the quality of water for domestic and agricultural use, interests which may be of vital importance for some regions.

Articles 11 to 18 establish a mechanism which appears to be both realistic and effective. However, in the view of the Greek Government, the six-month period provided for is too short. A period of at least one year should therefore be allowed, especially with respect to article 13. Otherwise, if States do not have sufficient time to study and evaluate the possible effects, they will be inclined in every case to oppose projects of which they are notified.

As regards article 19, which allows a State to take unilateral action when a matter of the utmost urgency is involved, a situation which will be left to the judgement of the State itself, it should be noted that the article upsets the balance which the draft articles strive to achieve in this respect and that it undermines the system of safeguards based on articles 12 et seq. Abuses and faits accomplis will be inevitable. Accordingly, in the view of the Government of Greece, this article should be carefully reviewed.

The provisions of articles 20 to 25 appear, on the whole, to be satisfactory. They are patterned to a large extent on the new Convention on the Law of the Sea and other relevant international legal instruments dealing, inter alia, with the prevention of water pollution. In particular, the Government of Greece supports the use of the term "ecosystem", which is a sound and scientifically accepted concept.

The Government of Greece considers that article 21, paragraph 2, does not yet succeed in striking the balance that is sought between the rights of upstream and downstream countries. In addition to the prevention, reduction and control of pollution, the paragraph should also refer to the elimination of pollution, even if only in certain conditions. The words "control" and, possibly, "eliminate" should also be added after the words "prevent" and "mitigate" in article 24.

The importance of articles 26 and 27, which deal with the management and regulation of international watercourses, is obvious and the wording of the articles is, on the whole, satisfactory. The same applies to article 28, dealing with the maintenance and protection of installations. Article 29, on the protection of international watercourses and installations in time of armed conflict, deserves its place in the draft articles. It deals carefully with a sensitive issue.

While not denying the importance of the principle set forth in article 32, entitled "Non-discrimination", the Government of Greece believes that the issue is outside the scope of the draft articles. In point of fact, the provision relates to the right of access to justice, i.e., a matter governed by other international legal instruments. Accordingly, further thought should be given to whether such a provision should be included in the draft articles.

Lastly, the draft articles should definitely be rounded out with provisions on the settlement of disputes.

Given the nature of the matter, these provisions should relate to binding procedures for settlement, namely, arbitration and judicial settlement.

The Government of Greece reserves the right to make further comments on the draft articles at a later stage.

ICELAND

[See Nordic countries]

IRAQ

[Original: Arabic]

[28 January 1993]

1. All the articles and provisions of the draft and the comments on them are useful and accord with Iraq's conceptions on the non-navigational uses of international waterways.

2. In the commentary to article 8, reference is made to the term "transboundary waters" in an instrument adopted by the Economic Commission for Europe. This is incompatible with the definition of an international waterway. In our view, this term, wherever it has occurred, should not be adopted.

3. We propose that the following should be added to the end of draft article 6 (d):

> "taking into account that particular importance is to be accorded to existing uses over potential uses in the event they should conflict."

4. We propose that a subparagraph (g) should be added to article 6.1 of the draft taking into account the quality of the water entering any watercourse State in determining equitable and reasonable quantity.

5. Article 8 states as follows:

> "Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse."

We propose that the word "possible" should be added after "optimal utilization" because this expression is non-restrictive and is tied to scientific and technological development.

NORDIC COUNTRIES

[Original: English]

[18 December 1992]

The Nordic countries have a special interest in these Draft Articles not only because the General Assembly resolution (2669 (XXV)) which recommended that the International Law Commission should take up the study on the non-navigational uses of international watercourses resulted from a Nordic initiative, but also because of the importance of legal problems relating to the use of international watercourses and the need to coordinate the work carried out by many international organs. The draft articles adopted by the International Law Commission may now be regarded as a decisive step towards the final codification of the law of international watercourses.

In the opinion of the five Nordic countries, the framework agreement approach adopted by the International Law Commission in drafting the articles on the non-navigational uses of internatinal watercourses provides a good basis for further negotiations. It leaves the specific rules to be applied to individual watercourses to be set out in agreements between the States concerned, as has been the current practice. However, this approach should not lead to producing only recommendations.

As a general comment the Nordic countries would like to draw attention to the two Conventions concluded recently within. The United Nations Economic Commission for Europe (ECE), namely the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, signed 18 March 1992 at Helsinki and the Convention on Environmental Impact Assessment, signed on 26 February 1991 at Espoo, Finland. Both Conventions and the draft articles on the non-navigational uses of international watercourses are partly similar in scope and deal with analogous legal problems, while solutions are not necessarily always consistent. In order to avoid a situation where conflicting rules were to apply, it is submitted that attention be paid to the harmonization of the draft articles with the above-mentioned Conventions where possible.

The Nordic countries consider the term "international watercourse" somewhat unclear and ambiguous. Admittedly, the use of other terms already rejected by the Commission, such as "drainage basin", would also entail difficulties. Of course, it is essentially important that whichever concept will be used in article 1, it would encompass an adequate definition in article 2. However, it is submitted that the Commission might still consider as a new alternative to "international watercourse" the term "transboundary waters", which is used in a very similar context in the above-mentioned ECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes.

One of the most important questions relating to the adoption of the term "watercourse" is whether the rules governing surface waters would be

applicable also in regard to groundwater and, more specifically, so-called confined groundwater. There are in many parts of the world rich and important confined groundwater resources, intersected by State boundaries, but without physical relationship with any surface-water systems. Nevertheless, such confined groundwater resources may react like any other hydrologic unit.

Although the present definition of the term "watercourse" seems to pass over confined groundwater, it should not be deduced that aquifers without any physical relationship with surface waters must be left outside all legal regulation. There might be reason to take up, once again, the question of confined groundwater, for the purpose of making clear the essence of that concept and preparing draft rules on its application.

Since the early stages of the work of the International Law Commission the question of the relationship between equitable and reasonable utilization and participation on the one hand (art. 5) and the obligation not to cause appreciable harm on the other hand (art. 7), has proved to be problematic. The principle of equitable utilization should probably not be subordinated to the prohibition on causing appreciable harm, because it was originally introduced in order to modify that prohibition. It is the view of the Nordic countries that in cases of uses not involving pollution, the obligation not to cause appreciable harm should perhaps rather be subject to the principle of equitable utilization. But then it would follow that prevention, reduction and control of pollution should also be submitted to more explicit safeguards under Article 7.

It might also be mentioned that the doctrine of equitable utilization is still lacking a definite procedural machinery for its implementation in concrete cases. It sets no a priori standards that are universally applicable concerning the uses of international watercourses.

Finally, it is suggested that the relationship of part III (Planned measures) and part IV (Protection and preservation) of the draft articles be further elaborated. This is important since the implementation of planned measures in accordance with part III may in many cases also entail the probability of pollution of an international watercourse dealt with in article 21.

NORWAY

[See Nordic countries]

SPAIN

[Original: Spanish]

[27 January 1993]

1. In the Spanish Government's view, the draft articles constitute an acceptable basis for discussion.

2. With regard to paragraph (5) of the commentary to article 2, the Spanish Government believes that it would be appropriate to prepare draft articles relating to the utilization of "confined" groundwater in cases where a frontier crosses the aquifer in which such groundwater occurs; such articles could perhaps be incorporated into the draft under consideration.

3. Attention is drawn to the reference made in article 3 to the application of the draft articles. As currently drafted, paragraphs 1 and 3 of article 3 imply that the rights and obligations enumerated in the draft articles would be applicable only in the event of an agreement between watercourse States. A close reading of all the draft articles and the commentaries thereon shows that that is not the intention of the International Law Commission (see para. (5), in fine, of the commentary to draft article (5)). One possible solution would be to delete the words "or application" in article 3, paragraph 3, first and second lines; in paragraph 1, second and third lines, the words "apply and" could also be deleted, for greater clarity.

4. In article 6, paragraph 1, the Spanish Government would like to insert, between subparagraphs (d) and (e), a new subparagraph which could read as follows: "the extent of the dependence of each watercourse State upon the waters in question". In the Spanish Government's view, while the idea reflected in the phrase transcribed above is implicit in several subparagraphs of article 6, paragraph 1, it has not been made sufficiently explicit in that paragraph as currently drafted. Furthermore, the proposed text has been taken from the United States Memorandum of 1958, to which paragraph (7) of the commentary to the article under consideration refers.

5. With regard to article 8, it might perhaps be appropriate to mention expressly the principles of good faith and good-neighbourliness, to which paragraph (2) of the commentary on the article refers.

6. In the Spanish version of article 9, paragraph 2, the words "recogida" or "recolección" [collecting] could be used in lieu of the word "reunión".

7. Article 11, as currently drafted, lays down a number of obligations for watercourse States which, in the Spanish Government's view, would be difficult to apply in practice. It is suggested that the wording be changed so as to limit the scope of the article to those planned measures which are likely to have appreciable effects or, alternatively, to eliminate the obligation to consult.

8. It is suggested that paragraph 3 of article 18 be amended with a view to establishing a more balanced system which would take into account the varoius interests involved. The proposed amendment could read as follows:

> "During the course of the consultations and negotiations, the State planning the measures shall refrain from implementing or permitting the implementation of those measures for a period not exceeding six months if the other State, at the time it requests the initiation of consultations and negotiations, submits a request to that effect accompanied by a documented explanation setting forth the reasons for the request."

9. In the Spanish version of article 24, the conjunction "y" [and] should be inserted at the end of the paragraph, before the words "que puedan ser nocivos para otros Estados del curso de agua" [that may be harmful to other watercourse States].

SWEDEN

[See Nordic countries]

SYRIAN ARAB REPUBLIC

[Original: English]

[10 April 1992]

Article 7

Insert a new paragraph 2 reading as follows:

"2. In utilizing an international watercourse, watercourse States shall undertake not to cut off or reduce the watercourse discharge below the sanitary discharge needed in the river bed under any circumstances."

Article 8

Insert a new paragraph 2 reading as follows:

"2. Cooperation, in this context, means, among others, that watercourse States shall determine and agree upon their reasonable and equitable shares of water uses in accordance with the water resources of the international watercourse concerned."

Article 9

Reformulate paragraph 2 as follows (added words are underlined):

"1. Pursuant to article 8, watercourse States shall, on a regular basis, through joint committees, exchange reasonably available data and information on the condition of the watercourse, in particular that of a hydrological, meteorological, hydrogeological, ecological and reservoir operational nature, as well as related forecasts; and this before and after reaching the final agreement(s) on water uses of the international watercourse concerned."

The Government of the Syrian Arab Republic attaches great importance to these comments and observations being reflected in the draft articles by the International Law Commission when it considers again the draft with a view to adopting it.

TURKEY

[Original: English]

[25 January 1993]

I. GENERAL COMMENTS

1. To be realistic, a general draft of articles, prepared by the International Law Commission, which codifies and improves upon the rules of law on the non-navigational uses of international watercourses, has to be arranged as a non-detailed framework law, on account of the variety of geographical locations, hydrological constructions, demographical qualities and characteristics of international watercourses.

2. One main point of possible criticism as regards the draft articles is that those on environmental damage do not take into proper consideration the problems of development of States. The general emphasis on the "damage" factor has resulted in a text constraining the utilization by the upstream States. There is a need for a more balanced approach on this subject.

3. The draft articles should be a set of rules that can be applied in the context of good-neighbourliness rather than general principles that can be applied to all the international watercourses.

4. In determining the regime to be applied to international watercourses, we believe that the sovereignty of States over their own natural resources and their rights to manage these resources has not been taken sufficiently into consideration.

II. COMMENTS ON INDIVIDUAL ARTICLES

1. The term "watercourses", as it is used in the draft, is a term that might create difficulties in the future. This term has a broad definition, which also includes underground waters. Additionally, the term "watercourse system" used in the same draft contains also too broad a meaning. This term includes glaciers, canals and especially underground waters, and naturally leads to the sharing of these resources. This result would again be inconsistent with the generally accepted international law principle of the States' permanent sovereignty over their own natural resources. For this reason, only the limitation of the draft articles' application to surface waters can receive our approval.

2. Under the heading, "General principles", article 5 of the draft formulates the subjects of equitable and reasonable use of watercourses and participation.

According to paragraph 1 of article 5, a watercourse State has both the right to utilize an international watercourse in an equitable and reasonable manner and not to deprive other watercourse States of their right to equitable utilization.

Paragraph 2 of this article embodies the cooperation between the watercourse States. Although article 5 of the draft contains some positive elements for the upper-riparian State, it needs to be more balanced. For the sake of a well-balanced article, it will be appropriate to expand this paragraph to include a clause which restrict the use (and especially new uses) of the lower-riparian States. If this balance cannot be obtained, the subject of "participation" should be excluded from article 5. The resulting generalized article, containing the principles of equitable, reasonable and optimum use, would be equitable and sufficient.

3. The provisions of the third part of the draft are too detailed. They need to be simplified. The arrangements on notification and consultation procedures should be left to regional and local agreements, which can better consider the actual needs of each and every case. Those arrangements may complete the framework agreement.

4. Article 20 deals with the protection and preservation of the ecosystems of watercourse States. However, the article does not contain the criteria of what constitutes "an important damage". It would be appropriate to include such criteria in the article.

5. Under the heading "Miscellaneous provisions", the first paragraph of article 26 stipulates the initiation of consultations concerning the management of an international watercourse, which may include the establishment of a joint management mechanism, at the request of any of the watercourse States. The clause "at the request of any of them" has a mandatory character. We believe that this article should be rephrased in order to assure flexibility. The formulation of paragraph 1 of the article may lead to the obligation to negotiate an agreement in order to establish a joint management mechanism. This point needs to be clarified.

UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

[Original: English]

[15 January 1993]

Introduction

1. The United Kingdom Government commends the International Law Commission for the draft articles. Although the United Kingdom is not a major international watercourse State, it none the less welcomes these draft articles as being also a valuable contribution to the international protection of the environment. It is largely on this basis that the following comments are made.

2. It is opportune to consider the work of the Commission in the light of recent developments in international environmental law, including the 1991 Convention on Environmental Impact Assessment in a Transboundary Context ("Espoo Convention"), the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes ("Helsinki Convention") and the 1992 United Nations Conference on Environment and Development ("Rio Conference"). That Conference was the adoption of an ambitious programme of environmental action into the next century, Agenda 21, which devotes a chapter to freshwater resources. This acknowledges that sustainable development of water resourses is essential both for the satisfaction of basic needs and for the safeguarding of ecosystems.

3. The draft articles provide a good basis on which to build legal arrangements which address the international dimension of watercourse development. But if the draft articles, modified and refined in the light of these and other comments and further discussion, are to provide a sound foundation for future action, it is important that they accurately reflect the current state of international environmental law. The recently concluded Helsinki Convention, Espoo Convention and Rio Declaration should be taken fully into account, and particularly their emphasis upon preventing significant adverse impacts or effects upon the environment. The international community attaches importance to work by the Commission on this and other environmentally related topics. Chapter 39 of Agenda 21 states, inter alia, that "[f]uture [codification] projects for the progressive development and codification of international law on sustainable development should take into account the ongoing work of the International Law Commission" (A/CONF.151/26, annex II, chap. 39, para. 39.1 (e)).

4. On previous occasions the United Kingdom has indicated its reservations concerning the final form of the instrument containing the text drawn up by the Commission. The United Kingdom still believes the work of the Commission on this topic is best embodied in a set of Model Rules, Recommendations or Guidelines, to be applied and modified as the circumstances of the case require. Such Rules, Recommendations or Guidelines would provide authoritative guidance respecting the legal rules to be applied, yet would

have the flexibility necessary to accommodate the wide diversity of international watercourse systems. Their character would be essentially residual, leaving States free to enter into agreements on specific watercourses. In this form the draft articles would be more likely to meet with general acceptance. If, however, the Commission continues to favour a convention, the United Kingdom would suggest that it consider amending the articles so as to form a framework convention which would serve as a guide to watercourse States for the conclusion of bilateral arrangements tailored to the circumstances of the particular watercourse concerned.

5. There remains also the issue of overlap between the present topic and those of State responsibility and international liability for injurious consequences arising from acts not prohibited by international law. Although the United Kingdom would not wish to urge any delay in the completion of the Commission's work on international watercourses, it is vital that its work on all these topics is consistent. In particular, the threshold of harm set in article 7 should accord with the work of the Commission on the other topics and with current generally accepted principles of international law. For example, the draft articles on injurious consequences which have been produced to date are broadly consistent with the Helsinki Convention and the Espoo Convention. This point is returned to in the consideration of the details of the draft articles.

Detailed comments

6, Against the background of these introductory remarks, the United Kingdom has a number of detailed comments to offer on the draft articles.

PART I

Article 2

7. The United Kingdom supports the application of the draft articles to "international watercourse systems" defined to include groundwater. This reflects scientific and geographic reality. In many areas of the world groundwater provides the main source of freshwater needed for all forms of life. The Commission's definition accords with the approach taken in chapter 18 of Agenda 21, which views the freshwater environment as part of the hydrological cycle encompassing both surface water and groundwater. It is also consistent with the definition of "transboundary waters" contained in article 1 (1) of the Helsinki Convention.

8. While the inclusion of groundwater is welcome, the United Kingdom considers that the potential scope of the draft articles is too wide. As they stand, they impose obligations on States which would be very difficult to define and are likely to be unacceptable to States if the draft articles are embodied in legally binding form. The draft articles depend upon States being able to define the scope of their obligations by reference to the physical

presence of international watercourses within their territory. Such identification is difficult and expensive in the case of groundwater. One of the seven action programmes contained in chapter 18 of Agenda 21 is addressed to the problem of water resources assessment, including the identification of potential sources of freshwater supply. It encourages all States, according to their capacity and available resources, to "[c]ooperate in the assessment of transboundary water resources, subject to the prior agreement of each riparian State concerned" (ibid., chap. 18, para. 18.27 (a) (iv)). In addition, research-and-development programmes, at the national, subregional, regional and international levels in support of water resources assessment activities, are to be established or strengthened. Model Rules, Recommendations or Guidelines would overcome these difficulties. They would permit States to conclude specific agreements with respect to those watercourses they had identified, rather than assuming general obligations the extent of which could not readily be determined.

Article 3

9. The United Kingdom would urge the Commission to reconsider the language of paragraph 1, which reflects the present uncertainty regarding the final form of these draft articles. On the one hand, these provisions are stated in article 1 to be of general application, yet on the other they are adjustable on a case-by-case basis under article 3 (1). Whilst flexibility is a desirable feature which should be retained, the function of these articles needs to be clearly identified and reflected in the draft text.

10. Paragraph 2 includes the phrase "adversely affect, to an appreciable extent". On numerous occasions the United Kingdom has expressed its reservations regarding use of the word "appreciable". It remains its view that "significant" is a more accurate reflection of the meaning of these articles, particularly when used to modify "harm". The term "appreciable harm" is at the heart of several key provisions of the draft articles, most notably article 7, yet its meaning is far from clear. The commentary accompanying draft article 7 states that "appreciable" embodies a factual standard which requires harm to be substantiated by objective evidence; it is not "insignificant" or "barely detectable", nor is it necessarily "serious". The United Kingdom is in agreement with the meaning attributed to "appreciable" in the commentary, but does not consider that "appreciable" adequately conveys the intended meaning. The word used should convey a sense of harm which is significant, not of a transitory or limited effect. And it should convey this sense in the text, rather than requiring recourse to the commentary for clarification. (This comment applies also where the word "appreciable" appears elsewhere in the draft, i.e., in articles 4 (2), 7, 12, 18 (1), 21 (2), 22 and 28 (2).)

11. Nor does "appreciable" reflect the threshold of responsibility that has been adopted in the most recent treaties in the environmental field, most notably the 1992 United Nations Framework Convention on Biological Diversity. Articles 7 and 14 of that Convention, which has been signed by nearly all the

States which participated in the Rio Conference, uses the terms "significant adverse impacts" and "significant adverse effects", respectively. Principles 17 and 19 of the Rio Declaration refer to "significant adverse impact" and "significant adverse transboundary environmental effect", respectively. Article 1 (2) of the Helsinki Convention refers to "significant adverse effect", while article 2 (1) of the Espoo Convention employs the phrase "significant transboundary environmental impact".

Articles 5 and 7

12. It is clear that the reason for qualifying "harm" is to ensure that the draft articles do not unnecessarily hamper the utilization of international watercourses. This balance between utilization and environmental protection was the direct focus of the Rio Conference. The Commission is to be commended for its approach to the present topic, which has placed the utilization of watercourses firmly in the context of sustainable development. International watercourse States may utilize an international watercourse in an equitable and reasonable manner, but this obligation of equitable use in draft article 5 is subordinate to the obligation not to cause "appreciable" harm contained in article 7.

13. In principle, the United Kingdom supports the subordination of the obligation of equitable utilization to the obligation not to cause "appreciable" harm, but considers that the balance between environmental protection and utilization would be clearer if the word "significant" modified "harm". (See comments on art. 3 above.) This is consistent with chapter 18 of Agenda 21 which attaches equal importance to the satisfaction of basic needs and safeguarding of ecosystems in the programme area of "integrated water resources development and management".

Article 8

14. Article 8 states a duty to cooperate, a duty which is recognized in many treaties in the environmental and other spheres. The recently concluded Convention on Biological Diversity includes in article 5 such a duty with respect to matters beyond national jurisdiction, and on other matters of mutual interest. While welcoming the inclusion of a general obligation to cooperate, the United Kingdom maintains certain reservations regarding the practical working of article 8. In particular, the United Kingdom questions whether the concepts of "optimal utilization" and "adequate protection" are measurable in a way which allows States to meet the obligation set forth in article 8, and to identify failures to attain the required standard. The Commission might wish to reconsider setting forth in detail the objectives of cooperation, thereby fleshing out the substance of the duty to cooperate.

Article 9

15. The duty to exchange data and information is likewise found in a wide range of existing international instruments, and gives concrete expression to one facet of the duty to cooperate in article 8. It is important to ensure that the obligation to exchange "reasonably available data and information" does not become excessively burdensome for the States concerned. For this reason the United Kingdom welcomes use of the term "reasonable". What is "reasonable" will vary from case to case, depending upon a variety of factors ranging from technological capability to national laws regarding data protection. It would be helpful, however, to provide guidance in the form of a (non-exhaustive) list of what constitutes "reasonably available data", such an approach being found in article 13 (1) of the Helsinki Convention.

Article 10

16. The United Kingdom doubts whether the reference in paragraph 2 to "vital human needs" is sufficiently specific to perform a useful function additional to the criteria already specified in the article. If the intention of this paragraph is to assign priority to the satisfaction of specific vital human needs, such as the availability of clean drinking-water, then it would be preferable to redraft the article so as to make specific reference to such needs.

PART III

17. Subject to the specific comments in the following paragraphs, the United Kingdom welcomes articles 11 to 19, which achieve an adequate balance between the interests of the State planning the measure and other watercourse States potentially affected thereby. These provisions, particularly article 12, are consistent with principle 19 of the Rio Declaration.

Article 12

18. The United Kingdom would prefer this article to refer to "significant adverse effect" in place of "appreciable adverse effect". (See comments on art. 3.) It is important to distinguish between the level of impact which triggers the duty to notify and the level of harm which breaches the duty contained in article 7. The clear intention of article 12 is to ensure that the duty to notify is triggered at a lower level than the duty contained in article 7. This suggestion is consistent also with article 14 of the Helsinki Convention, which imposes the duty to inform other riparian parties of "any critical situation that may have transboundary impact". "Transboundary impact" is defined in article 1 (2) of the Convention as "any significant adverse effect on the environment".

PART IV

19. Protection and preservation of the ecosystems of international watercourses is an essential component of the draft articles. One of the seven action programmes detailed in chapter 18 of Agenda 21 is devoted to protection of water resources, water quality and aquatic ecosystems. The draft articles are broadly consistent with one of the targets set by the action programme, which is "to initiate programmes for the protection, conservation and rational use of these resources on a sustainable basis" (ibid., para. 18.39 (a)). The United Kingdom is in favour of the approach adopted in this part of the draft articles which distinguishes between pollution and environmental protection. Chapter 17 of Agenda 21, which addresses protection of the oceans, includes an action programme directed at marine environmental protection. The provisions of part IV are welcome also as a positive contribution to the fulfilment of the objectives of that chapter.

Article 21

20. The United Kingdom welcomes paragraph 1, which provides a factual definition of "pollution of an international watercourse". The trigger for the obligation of States to prevent, reduce and control pollution of an international watercourse is contained in paragraph 2, which refers to "appreciable harm". The United Kingdom regrets the use of "harmonize" in the last sentence of this paragraph. This conveys an impression that national policies should be rendered similar, rather than the milder obligation intended by the article of avoiding policy conflicts.

21. The United Kingdom would therefore prefer the final sentence of paragraph 2 to be replaced by:

> "Watercourse States shall take steps to coordinate their policies to this end."

Article 22

22. To achieve drafting consistency, the United Kingdom suggests the addition of the phrase "or to their environment" at the end of the article. The reason for inclusion of this in article 21 would seem equally to apply to this article.

Article 23

23. The United Kingdom welcomes this article, which is consistent with the provisions of article 192 of the 1982 United Nations Convention on the Law of the Sea. It recognizes that damage could be caused to the marine environment, including estuaries, without violating the duty not to cause "appreciable [or, as we would prefer, "significant"] harm" to other watercourse States, the

latter being the focus of article 22. The importance of article 23 is underlined by the fact that 70 per cent of marine pollution emanates from land-based sources.

PART VI

Article 26

24. The United Kingdom welcomes this article, which complements the first action programme contained in chapter 18 of Agenda 21, concerned with integrated water resources development and management. Effective implementation and coordination mechanisms are recognized as necessary for the sustainable development of water resources. In this connection paragraph 2 (a) is particularly welcome, with its emphasis upon the sustainable development of an international watercourse and providing for the implementation of any plans adopted. The Commission might, however, follow the lead given to article 9 of the Helsinki Convention, which provides for the establishment of joint bodies under bilateral or multilateral agreements which embrace relevant issues covered by the Convention, and specifies some of the tasks which might be performed by such bodies.

Article 27

25. The United Kingdom remains unconvinced of the need for this article, which is no more than a specific application of the obligation to cooperate contained in draft article 8.

Article 29

26. The United Kingdom has previously voiced its reservations regarding the inclusion of a draft article dealing with international watercourses and installations in time of armed conflict. The protection of the environment, and specifically of watercourses and related installations, facilities and other works is already provided for under existing rules of international law relating to armed conflicts. The United Kingdom believes it is thus undesirable to insert such a general article in a text otherwise devoted to a quite different topic. This does not of course foreclose discussion of the issue in other, more appropriate, forums. The United Kingdom would invite the Commission to consider redrafting the article along the following lines:

> "These articles are without prejudice to the application to international watercourses of the principles and rules of international law applicable in international and internal armed conflicts."

Article 30

27. It is difficult to see what this article adds to the obligations of States under articles 9 to 19. There is no mention of "direct contacts" under the preceding articles, and it would be assumed that in carrying out their obligations in good faith States would employ both direct and indirect means, as appropriate.

Article 32

28. The United Kingdom welcomes the principle of non-discrimination contained in this article, which facilitates the application of the "polluter pays" principle in domestic legal systems. However, since it is for each domestic legal system to set the threshold of harm which gives rise to a cause of action, the use of "appreciable" is inappropriate. Given the particular object of this article, it is not necessary to qualify "harm".

UNITED STATES OF AMERICA

[Original: English]

[4 January 1993]

The United States appreciates the ILC's efforts in completing a first reading of the draft articles. The United States fully supports the decision to structure the draft as a framework document, which sets forth general rights and obligations that will guide watercourse States in developing management practices tailored to their circumstances. The articles' emphasis on cooperation among watercourse States is particularly salutary. The following general comments and observations apply to the text as a whole:

(a) Appreciable harm. The draft articles impose obligations not to cause "appreciable" harm to watercourse States. "Appreciable" harm is established by "objective evidence" of a "real impairment of use, i.e. a detrimental impact of some consequence upon, for example, public health, industry, property, agriculture or the environment in the affected States". (Commentary, p. 53)

The United States endorses the ILC's effort to exclude insignificant or trivial harms from the articles. The United States is concerned, however, that "appreciable" sets too low a threshold. The landmark Helsinki Rules set a standard of "substantial" in 1966. As we learn more about the effects of human activity on the environment, it becomes possible to identify impacts at

ever lower thresholds. Recent international agreements relevant to watercourses adopt "significant" or "serious" as the standard.*

The United States believes that the ILC should bring its standard into accord with these documents.

(2) Public participation. The involvement of the public in a State's consideration of activities affecting transboundary watercourses can enhance protection and use of those watercourses, and is an approach followed recently in various conventions, including those discussed in paragraph (1). The United States recommends that the ILC consider ways that the articles could encourage public involvement. The most appropriate articles appear to be articles 12 and/or 15, as part of the obligations of both the notifying and notified States, and article 25, in emergency planning and response measures. As redrafted, these articles would supplement current article 32, which provides that States shall not discriminate against a person who has suffered harm "on the basis of nationality or residence" in granting access to "judicial and other procedures" but does not describe those procedures. In our view, however, the redrafted articles need not and should not create private causes of action or require States to establish proceedings beyond those available to their own citizens. For ideas on the content of revisions to these articles, the proposals made by the Special Rapporteur in his sixth report might be given further consideration.

(3) The primacy of equitable and reasonable utilization. "Equitable and reasonable" utilization is the fundamental rule regarding international watercourses, as article 5 notes. Article 6 sets forth the factors relevant to determining when use is equitable and reasonable. (Art. 7 is also relevant, although it serves as an independent legal requirement as well.) Unfortunately, subsequent articles appear to blur the meaning of this rule. Article 26 (2), for example, speaks of management for "sustainable development" of watercourses and for "rationale and optimal" use of watercourses. The relationship of these terms to "equitable and reasonable" is not specified, and their meaning in international law is not clear. Part IV, on protection and preservation, also appears to set forth specific obligations that may supersede the obligation declared in article 5.

The United States favours making clear that all subsequent articles are subordinate to article 5's requirement of "equitable and reasonable" utilization. The lone exceptions to this might be those articles reflecting legal responsibilities already well established (for example, the obligation

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* See United Nations Economic Commission for Europe (ECE) Convention on Protection and Use of Transboundary Watercourses and International Lakes (signed 17 March 1992) ("significant" - art. 1 (2)); ECE Convention on Environmental Impact Assessment (signed 25 February 1991) ("significant" - art. 2); ECE Convention on Transboundary Effects of Industrial Accidents (signed 17 March 1992) ("serious" - art. 1 (d)).

not to harm another's property or marine protection obligations accepted in the customary law of the sea). In our view, the ILC should consider redrafting these subsequent articles to incorporate the terms used in article 6 (1); alternatively, the terms in the later articles could be incorporated into article 6 (1), if they can be properly defined.

In addition, the United States believes that close attention should be paid to the relationship between the rules of equitable utilization and the "no harm" rule of article 7. While the commentary to article 7 states that the "no harm" rule prevails in the event of conflict, this is not apparent in the articles as drafted, and indeed there may be circumstances where this should not be the case.

The following comments and observations apply to specific articles:

(1) Article 3

(a) The United States recommends that the phrase "adversely affect, to an appreciable extent" be replaced by "cause significant harm to". The reason for changing "appreciable" to "significant" was explained in our general comments above. We also believe the meaning of "extent" is not clear, and is confusing since it does not appear in other articles, such as article 7. Under our approach, a localized harm, if "significant", would fall within the proposed articles, even if its "extent" were not "significant".

For the same reasons, in article 4 (2), the phrase "may be affected to an appreciable extent" should be replaced with "may incur significant harm".

(b) The United States supports the framework approach of the article, which is mirrored by the 1992 ECE Transboundary Watercourses Convention. The United States also recommends moving articles 8 and 26 to precede article 3, to give those two articles a greater sense of priority. The primary objective of the draft articles is cooperation in the use and protection of a transboundary watercourse. An agreement is merely one means to that end, as article 3 (1) acknowledges by not making agreements mandatory.

(2) Article 4

(a) The United States questions the meaning of paragraph 2 of this article, on the ground that "applies to" is ambiguous. If it is synonymous with "affects appreciably", it adds nothing to article 4 (2). If "applies to" means "governs" or "regulates", then the paragraph is tautological, because every watercourse State must be involved in an agreement that regulates a watercourse within all their territory.

(b) See comment (1) (a), on article 3, above.

(3) Article 5

The United States supports the principle of equitable utilization. We note that, once use by one State becomes inconsistent with its obligations not to cause effects in another State, there is an inexorable tension between uses. Although accommodations for these competing principles can be fashioned, often on a case-by-case basis, the tension should be avoided when possible. It is therefore important that article 7 not be triggered by harm that is less than "significant".

(4) Article 6 (2)

The United States supports the concept of this paragraph, but suggests that it is redundant with articles 8 and 10 (2). Accordingly, the ILC should consider its deletion.

(5) Article 7

(a) In addition to the points mentioned in general comment (1) above, the United States believes that either in this draft article itself, or in the commentary to this article, it should be made clear that this article expresses a rule of responsibility (in effect, due diligence) rather than one of liability.

(b) The United States also urges that the ILC evaluate this article's possible effects on market-oriented mechanisms, such as tradable quantity and emissions allowance systems. Market-oriented mechanisms allow market actors to decide (within certain limits) whether it is more efficient for them to curtail individual activities or to pay a premium for its continuation. Because persons other than States are responsible for deciding about specific uses that may harm a watercourse, it is not clear that these mechanisms are consistent with article 7. The ILC should ensure that the article does not inhibit adoption of such policies.

(6) Article 10 (2)

The United States proposes that this article refer to article 8, which sets forth bases for State cooperation, as one of the articles to be consulted in resolving competing uses.

(7) Article 25

The United States attaches great importance to preventing emergencies and mitigating damage from them. For example, the United States has concluded joint marine emergency contingency plans with Mexico, Canada and the former Soviet Union and has actively participated in the development of emergency response measures within the Economic Commission for Europe (ECE), the Organisation for Economic Cooperation and Development (OECD) and the International Maritime Organization (IMO), as well as within regional

agreements such as the Cartagena Convention, which contains a protocol on emergency response to oil spills.

(8) Article 26 (2)

See general comment (2), above. The United States questions whether the components of "management" mentioned herein exemplify States' obligations concerning "equitable and reasonable" utilization (art. 5). The United States does not support adding obligations to the one expressed in article 5. As suggested above, to the extent that they have independent meaning, "sustainable development" and "rational and optimal utilization" should be incorporated into article 6 (1), which sets forth the factors relevant to determining whether use is "equitable and reasonable". If they do not have independent meaning, the phrases should be replaced with phrases used in article 6 (1).

(9) Article 29

The United States supports the conclusion that the applicable rules in this area are those of armed conflict.

(10) Article 32

(a) The United States strongly supports the principle of non-discrimination, especially as it pertains to the public's participation in proceedings relating to threats to an international watercourse. The United States notes, however, that a claimant could be denied standing in a suit in a United States court in part based on the fact that the claimant is not a resident in the area of the international watercourse and therefore cannot show any harm. International law does not, and should not, require that standing be granted in such circumstances.

(b) In our view, this article should not be interpreted as requiring a State to provide proceedings or relief beyond those available to its own citizens. Recent practice in the ECE, for example, calls for an opportunity for the affected public to participate in proceedings "equivalent to that provided to the public of the Party of origin" (see ECE Convention on Environmental Impact Assessment in a Transboundary Context, art. 2 (6)). The ECE Convention of Transboundary Effects of Industrial Accidents contains comparable language in articles 9 (2) and 9 (3).

Conclusion

The United States appreciates the opportunity to provide these comments and observations.

II. COMMENTS AND OBSERVATIONS RECEIVED FROM NON-MEMBER STATES

SWITZERLAND

[Original: French]

[14 January 1993]

1. Introduction

The Swiss Government wishes to express its appreciation to the members of the International Law Commission and the Commission's Special Rapporteurs who have been studying the substantive and procedural rules on the non-navigational uses of international watercourses since 1974. The draft articles adopted in 1991 by the Commission on first reading are a valuable contribution to the law of international watercourses. The continuing lacunae and uncertainties in this law stem mainly from the nature of the subject: problems relating to the utilization of shared natural resources are particularly difficult to solve. The Commission's task was made easier, to a certain extent, by the previous work of two learned societies, the Institute of International Law (resolution of 11 September 1961 entitled "Utilization of non-maritime international waters, except for navigation" 1/) and the International Law Association (ILA) (Helsinki Rules of 1966 2/). Although the Commission's draft differs from those two documents in certain respects, the three texts agree on a fundamental point: they accept the principle of equitable and reasonable utilization (and participation).

On the whole, the Swiss Government takes a favourable view of the draft articles prepared by the Commission. The observations made here are intended to be constructive. In an area as crucial to the future of mankind as the sharing of water resources, it is very much in the international community's interest to achieve rapid results.

2. Scope of the draft articles

The Commission proposes that its work should lead to a "framework agreement", i.e., a model convention which could be used by States preparing to enter into an agreement on the use of the resources of a shared watercourse (draft art. 3, para. 1). The formula thus proposed makes it possible to link elements of lex ferenda to lex lata without having to identify either, which could facilitate the adoption of the text by the community of States.

1/ Annuaire de l'Institut de droit international, vol. 49-II (1961), p. 381.

2/ Helsinki Rules on the Uses of the Waters of International Rivers, ILA, Report of the Fifty-second Conference, Helsinki, 1966 (London, 1967), p. 484.

It can nevertheless be assumed that most of the substantive rules contained in the draft are supposed to reflect customary law, while procedural rules, by their very nature, fall in the category of the progressive development of international law. Generally speaking, the Swiss Government endorses this approach.

The Commission suggests the drawing-up of a model convention with which States parties may choose to comply entirely or in part when entering into watercourse agreements. This should mean: (1) that even if States become parties to the model convention, they will be free when they enter into an agreement on an international watercourse or part thereof to do so either within or outside the framework of the model convention (see draft art. 3, para. 1); and (2) that the very many existing watercourse agreements will remain in force until the States that are parties both to such agreements and to the framework convention decide to adjust the former to the latter. This second point, unlike the first, is not clarified in the draft articles. The Swiss Government would like this lacuna to be closed by means of an indication in the same article that the framework convention does not affect in any manner whatsoever the validity and content of existing watercourse agreements.

Draft article 2 provides that the framework convention shall apply to "international watercourses". The term "watercourse" defined in subparagraph (b) of article 2 means "a system of surface and underground waters constituting by virtue of their physical relationship a unitary whole and flowing into a common terminus". Paragraph (5) of the commentary on article 2 indicates that a "system" of waters is composed of a number of different components, including "rivers, lakes, aquifers, glaciers, reservoirs and canals", and that so long as these components are interrelated with one another they constitute "a unitary whole". This definition covers both surface and underground components, at least in so far as the underground components are related to surface water and are therefore integrated into the system; the definition does not include "confined" groundwater. The "watercourses" thus defined are "international" under subparagraph (a) of article 2 if their parts are situated in different States.

The decision to exclude the concepts of a drainage basin 3/ and a watercourse system is to be welcomed because many countries would have found them unacceptable, given their scope. But the concept of a watercourse, which has traditionally been confined to surface water, has been given such a wide definition in the draft that it in fact bears a resemblance to concepts that the Commission had wanted to exclude. As defined at present, this concept is likely to give rise to difficulties, especially for upstream States.

3/ Article II of the Helsinki Rules defines an international drainage basin as "a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and underground waters, flowing into a common terminus".

Moreover, it is difficult to understand why in article 2 the definition of an "international watercourse" (subpara. (a)) precedes the definition of a "watercourse" (subpara. (b)); the Swiss Government believes that the order of the two provisions should be reversed.

3. The content of the draft articles

The main provisions of the draft articles will now be considered, and the issue of whether the draft takes a balanced approach to the interests of upstream and downstream States will be left aside for the time being; that issue will be considered separately under section 4 below.

The key provisions of the Commission's draft are undoubtedly article 7, which prohibits causing appreciable harm (sic utere tuo ut alienum non laedas), article 5, on equitable and reasonable utilization, and article 6, on the application of article 5. The Swiss Government feels that these two precepts are now part of international customary law. Their inclusion in the draft articles is therefore fully justified. However, some additions or changes may prove desirable.

The question arises, first of all, as to whether articles 5 and 6 should be supplemented by a provision stipulating the modalities through which they are to be implemented, namely, territorial apportionment, or the allotment of areas or segments of the watercourses to each State concerned, as was done in the Indus Waters Treaty of 19 September 1960; 4/ sharing by rotation, where the waters or their use are reserved for a given watercourse State for one period, and for another State for another period, as provided for in the Final Act of 11 July 1868 concerning the delimitation of the international frontier of the Pyrénées between France and Spain; 5/ or sharing of the streamflow, its use or the energy generated (see, e.g., the Agreement of 8 November 1959 for the full utilization of the Nile waters 6/ and the Franco-Swiss Convention of 23 August 1963 concerning the Emosson hydroelectric facility 7/). Moreover, it should be recalled, in this connection, that equal apportionment between two parties on the basis of a treaty is common in respect of contiguous rivers. Other methods, such as the allotment of exclusive uses to various watercourse States, or the setting-up of systems of compensation, such as the one provided for in the Agreement between India and Nepal on the Gandak

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4/ United Nations Legislative Series, Legislative Texts and Treaty Provisions concerning the Utilization of International Rivers for Other Purposes than Navigation, New York, 1960 (ST/LEG/SER.B/12), p. 300.

5/ Ibid., p. 674,

6/ Ibid., p. 143.

7/ Recueil officiel (Switzerland), 1964, p. 1255.

irrigation and power project, 8/ can also be envisaged, as can the combination of several of these methods.

A description of possible methods, which would be the subject of an additional provision, might be of some use, since the text prepared by the Commission is intended to serve as a framework agreement: i.e., it would provide States which are contemplating the conclusion of a watercourse agreement with information concerning the various possible means of implementing the principle of equitable and reasonable utilization.

Article 7, as has been noted, calls upon watercourse States to utilize an international watercourse "in such a way as not to cause appreciable harm to other watercourse States". This provision departs from what might have been regarded as the general rule, namely, the prohibition of not just "appreciable", but rather "major", "substantial", "significant" or "serious" harm. 9/ By confining itself to the prohibition of "appreciable" harm, article 7, in its current wording, raises two problems. First, the adjective "appreciable" seems to reflect the intention to lower the threshold of allowable causes of harm, which is likely to antagonize upstream States, in particular. Secondly, this adjective is ambiguous. On the one hand, it is even vaguer than such adjectives as "major", "substantial", "significant" or "serious" and, accordingly, makes the application of the sic utere tuo rule more difficult. On the other hand, the word "appreciable" can have two meanings: it can serve either to distinguish harm which has certain consequences from harm which does not have such consequences, or to designate harm which can be "appreciated", i.e., perceived and estimated, as opposed to

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8/ Legislative Texts..., op. cit., p. 295. India agrees to construct, in Nepalese territory, a hydroelectric power station and transmission lines; it also agrees to supply Nepal with a certain quantity of power. For its part, Nepal agrees to construct, in its territory, a transmission and distribution system for the power generated.

9/ See, e.g., J. Andrassy, "Les relations internationales de voisinage", Recueil des cours de l'Académie de droit international de La Haye, vol. 79, 1951-II, pp. 73-182 (111-112). In support of his statement, this author cites several decisions of United States courts, a resolution adopted in 1911 by the Institute of International Law, and treaty provisions. With regard to the assessment of harm, Andrassy states as follows (p. 112): "The magnitude of harm must be assessed in relation to the two parties concerned. The proportion or disproportion between the benefit gained by one party and the disadvantage suffered by the other must be taken into consideration. The diversity of cases admits of no fixed rules, and allows broad scope for equity. It has been taken into account in the above-mentioned cases, in which the principle of equitable apportionment has been applied". It can be inferred from this passage that the prohibition against causing harm is an element of the principle of equitable utilization, rather than vice versa.

harm which cannot. 10/ In view of these problems, the Swiss Government would support the replacement of the adjective "appreciable" by one which more faithfully reflects the status quo in customary law.

Articles 8 to 19 contain procedural rules. Articles 11 to 19 indicate the course to be followed where a State envisages a new (or increased) watercourse activity. In general, these provisions appear to be acceptable to the Swiss Government. Two questions, however, warrant consideration.

As a commentator on the draft articles rightly indicates, a State which notifies other watercourse States of its intention to use a watercourse in a new way will, for a certain period, be prevented from implementing the planned measures (art. 14) and will, if objections are raised, be subject to a complex process of consultations and negotiations. For their part, notified States retain all their international rights, even if they do not reply to the notification within the prescribed period, as their situation continues to be governed by articles 5 to 7. 11/ It would appear to be desirable to adopt a stricter approach towards notified States by acknowledging, in accordance with the maxim qui tacet consentire consentire videtur si loqui debuisset ac potuisset ..., that a watercourse State which has failed to raise objections within the prescribed period, to a new activity announced by another watercourse State is deemed to have consented thereto.

Article 15 indicates that planned measures may give rise to objections if a notified State "finds that implementation of the planned measures would be inconsistent with the provisions of articles 5 [equitable utilization] or 7 [sic utere tuo ...]". It is this unilateral and subjective finding which triggers the negotiation process and the six-month moratorium provided for in article 17. Thus, a unilateral finding by the State or States concerned suffices to block a new activity temporarily, without giving the State which wishes to undertake that activity the least opportunity to have its merits validated by an impartial third party. This situation is likely to be especially prejudicial to developing countries wishing to undertake a new

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10/ Cf. M. Solanes, "The International Law Commission and legal principles related to the non-navigational uses of the waters of international rivers". Natural Resources Forum, vol. 11 (1987), pp. 351-361 (357): "the principle [proscribing 'appreciable' harm] does not prohibit 'minor' or irrelevant harm, but 'appreciable' harm meaning such injury apt to cause international liability. The term 'appreciable', meaning enough to be perceived or estimated, ought to be distinguished from 'substantial', meaning of considerable size or amount, or in more ordinary terms large." (Emphasis added.)

11/ C. B. Bourne, "The International Law Commission's draft articles on the law of international watercourses: principles and planned measures", Colorado Journal of International Environmental Law and Policy, vol. 3 (1992), pp. 65-92 (68-70).

activity which request financial support to that end from international financial institutions. Such support may be temporarily denied solely on the basis of another watercourse State having raised an objection pursuant to article 15.

This observation leads to another, more general one. The problem just outlined illustrates the special importance of an effective system of dispute settlement within the framework of the law of international watercourses, as recognized, moreover, by ILA in its Helsinki Rules and by the Commission's Special Rapporteur. In annexes II and I to his draft articles, S. C. McCaffrey in fact proposed mechanisms for the settlement of disputes between States and as well as between individuals. 12/ While the wording of the relevant article in annex II leaves something to be desired, 13/ both texts have the merit of having raised the question. For their part, the draft articles which have now been submitted to Governments for comments maintain total silence on this question. Filling this gap would appear to be one of the Commission's primary tasks.

4. Achieving a balance among the draft articles

If the future framework convention is to fulfil its aim, it must be balanced. It should not, for instance, favour either upstream or downstream States. Does the Commission's draft meet this requirement? In order to answer this question, two aspects must be considered: the relationship between, on the one hand, the prohibition against causing "appreciable" harm and the principle of equitable utilization and, on the other hand, the participation of watercourse States in agreements concluded among other States sharing the same watercourse.

The Commission had initially juxtaposed the sic utere tuo rule with the principle of equitable utilization, without specifying the relationship between these two elements, although the inclusion of the possible adverse

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12/ Sixth report on the law of the non-navigational uses of international watercourses, United Nations, 23 February and 7 June 1990, pp. 29 (A/CN.4/427/Add.1) and 50 (A/CN.4/427).

13/ At issue is article 5, which provides that a State party to a dispute concerning the interpretation or application of the future framework convention (cf. article 3 of annex II) may, if other methods fail to produce a settlement, submit the dispute "to binding arbitration by any permanent or ad hoc arbitral tribunal that has been accepted by all of the parties to the dispute". Such a provision would be doubly inadequate: (1) it should apply not to disputes relating to the framework convention - which is only a model and, as such, is hardly likely to give rise to difficulties - but to those arising from the interpretation or application of watercourse agreements concluded on the basis of the model; and (2) it should suggest that the parties to such agreements submit their disputes to binding, rather than discretionary, arbitration.

effects of an activity among the factors determining the extent of the right of equitable participation would suggest subordination of the first element to the second. Some members of the Commission, however, desired a clearer rule. Two of the Special Rapporteurs - S. M. Schwebel and S. C. McCaffrey - proposed wording which gave priority to the principle of equitable utilization. Article 8, paragraph 1, of the text suggested by S. M. Schwebel called upon system States to use the water resources of a watercourse system in such a manner as not to cause

> "appreciable harm to the interests of another system State, except as may be allowable under a determination for equitable participation for the international watercourse system involved". 14/

J. Evensen, on the other hand, wished to afford priority to the sic utere tuo rule by not including any text on this subject in the draft articles and by deleting the possible adverse effects of a use from the list of factors determining the extent of the right of equitable participation. 15/ This is the solution which finally prevailed, as shown by the notion that even minor harm - e.g., to the environment - cannot be tolerated, whether or not it comes under the heading of the right of equitable utilization by the State of origin. This notion is expressed in paragraph (2) of the commentary on draft article 7:

> "A watercourse State's right to utilize an international watercourse ... in an equitable and reasonable manner has its limit in the duty of that State not to cause appreciable harm to other watercourse States. In other words - prima facie, at least - utilization of an international watercourse ... is not equitable if it causes other watercourse States appreciable harm".

This solution, which is subject to criticism from the doctrinal point of view, 16/ seems infelicitous, as the Swiss representative on the Sixth Committee of the General Assembly suggested in the statement which he made on 31 October 1991. 17/

Since the problem outlined above has a substantial bearing on the fate of the draft articles, it seems advisable to give it thorough consideration.

14/ Yearbook of the International Law Commission, 1982, vol. II, (Part One), p. 103.

15/ Yearbook of the International Law Commission, 1983, vol. II, (Part One), pp. 171-172.

16/ E.g., Bourne, op. cit. (note 11), pp. 72-91.

17/ Text reproduced in "Pratique suisse en matière de droit international public 1991", No. 5.2, Revue suisse de droit international et de droit européen (RSDIE), vol. 2 (1992) (publication forthcoming).

S. C. McCaffrey, the Special Rapporteur, argued in support of the solution finally adopted (1) that it would be simpler to establish the existence of "appreciable" harm than to judge the equitable nature of a use; (2) that this solution would favour the "weaker" watercourse States; and (3) that it would afford better protection to the environment. 18/ These arguments are either inaccurate or not compelling.

It is not clear why it would be easier to apply the vague notion of "appreciable" harm than to gauge a right of "equitable" utilization on the basis of the series of factors listed in draft article 6; and, even if the contention were correct, the easiest solution is not necessarily the best. Nor is it clear that the hierarchy of norms suggested by the Commission would favour economically weak States. Quite the contrary, giving priority to the prohibition against causing "appreciable" harm is tantamount to giving almost unlimited protection to the current users of the watercourse, since any harm suffered necessarily has to do with existing uses. In other words, acquired rights are given preference. To assert that protecting acquired rights is the same as helping the weak is something of a paradox, especially in the area at issue here, because newcomers are, generally, less economically developed than first users and are, historically, upstream rather than downstream States. 19/ Lastly, while it may be that S. C. McCaffrey and the Commission are correct in thinking that the environment will be better served by the article 7 rule than by the principle of equitable utilization, the desired objective could be achieved without elevating the sic utere tuo precept, and with it the protection of existing uses, to the status of a priority rule. The protection sought could be just as easily ensured by restricting the priority of the sic utere tuo rule where the environment is concerned or,

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18/ "The law of international watercourses: some recent developments and unanswered questions", Denver Journal of International Law and Policy, vol. 17 (1989), pp. 505-526 (509-510); "The International Law Commission and its efforts to codify the international law of waterways", Annuaire Suisse de Droit International (ASDI), vol. 47 (1990), pp. 32-55 (51-52).

19/ McCaffrey, "The International Law Commission ...", op. cit., pp. 49-50.

as J. P. Lammers has suggested, by considering the application of a "mitigated"-no-substantial-harm principle. 20/

Thus, the system being proposed by the Commission does not offer compelling advantages. Furthermore, it entails serious disadvantages. First, as was indicated, it gives pre-eminence to the status quo, protecting the more developed watercourse States from heeding the inclinations of less developed States. The principle of equitable utilization would in effect be eclipsed by the sic utere tuo rule; priority would be given to existing uses over future activities. 21/ Such a system might, moreover, imply that each user has a veto when a watercourse State plans to undertake a new activity or increase an existing activity. Secondly, the pre-eminence of the prohibition against causing "appreciable" harm, ostensibly prompted by the desire to give better protection to the environment, might actually work to protect the sovereignty of watercourse States: for to speak of equitable participation is to speak of apportionment of uses and resources, and the concept of apportionment transcends that of sovereignty. The concern for giving priority to safeguarding sovereignty would in any case run counter to the commonly accepted idea that watercourse States form a community of interests and law 22/ and that, consequently, the sovereignty of each of the States is and

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20/ "'Balancing the equities' in international environmental law", in: Hague Academy of International Law, The Future of the International Law of the Environment, 1984 Workshop (Dordrecht, Nijhoff, 1985), pp. 153-165. The prohibition against causing substantial harm would thus not apply: (1) if its application affected objects or activities especially sensitive to transboundary pollution; (2) if the State of origin could not be held liable for the polluting activity according to the classic rules governing international liability; or (3) if the sacrifice that the cessation of the polluting activity constituted for the State of origin was disproportionate to the advantages that the victim State would gain from such cessation.

21/ The Helsinki Rules satisfactorily regulate how existing uses are to be dealt with. Article VIII, paragraph 1, of the Rules reads as follows:

> "1. An existing reasonable use may continue in operation unless the factors justifying its continuance are outweighed by other factors leading to the conclusion that it be modified or terminated so as to accommodate a competing incompatible use."

This provision gives existing activities presumptive pre-eminence. The potential user may overturn this presumption by establishing that the activities in question no longer fall within the framework of the right of equitable utilization of the States conducting them.

22/ Territorial Jurisdiction of the International Commission of the River Oder, Judgment of 10 September 1929, Permanent Court of International Justice, Series A, No. 23, p. 27.

must be restricted. Under the guise of full protection of the environment, the new hierarchy of rules advocated by the Commission would mean that State sovereignty would be better protected than it has been in the past. That, in the view of the Swiss Government, is an unwelcome trend. Lastly, this hierarchy departs from State practice, as pointed out in a recent study on United States-Canadian relations. 23/

For all these reasons, the Swiss Government would like the Commission to reconsider its draft articles in the light of this important point and, in that case, to endorse the concept which for more than 30 years has been the one underlying the work of ILA: the pre-eminence of the principle of equitable and reasonable utilization. This result could be achieved by deleting draft article 7, by reintroducing the possible adverse effects of an activity as one of the factors listed in draft article 6 as serving to determine the scope of the right of equitable utilization, and by restricting the priority of the sic utere tuo rule where protection of the environment is concerned, possibly by mitigating that rule.

In the view of the Swiss Government, the balance between downstream and upstream States is also compromised by draft article 4, paragraph 2: when some of the States sharing a watercourse negotiate an agreement inter se that applies to a part of the watercourse or to a particular use of the watercourse, any other watercourse State which may be affected to an appreciable extent by the agreement is entitled to participate in its negotiation and even to become a party thereto. Because such agreements are more likely to be concluded among downstream States, it is primarily their freedom to conclude agreements that is curtailed by article 4, paragraph 2. Since the usefulness of such a provision is unclear, it would appear to be more appropriate to provide that all States wishing to regulate a new use by means of an agreement inter se are bound by the obligations stipulated in articles 11 to 19.

5. Recapitulation

The foregoing remarks are not exhaustive. In recent years, the Swiss representative on the Sixth Committee has commented on three occasions - 3 November 1988, 31 October 1990 and 31 October 1991 - on the articles proposed for inclusion in the International Law Commission draft. 24/ Some of

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23/ P. K. Wouters, Theory and Practice in the Allocation of the Non-navigational Uses of International Watercourses. Canada and the United States (Geneva, IUHEI, 1992).

24/ "Pratique suisse en matière de droit international public 1989", No. 5.2, ASDI, vol. 46 (1989), p. 228; "Pratique suisse ... 1990", No. 5.1, RSDIE, vol. 1 (1991), p. 529; and "Pratique suisse ... 1991", No. 5.2, RSDIE, vol. 2 (1992) (publication forthcoming).

his comments have been reiterated or expanded in these remarks. Others - those, for example, having to do with the protection and preservation of the environment 25/ and those on draft article 26 concerning management 26/ - have not been recalled but are still valid and must also be considered an integral part of this statement.

By way of conclusion, the Swiss Government offers this recapitulation of the points in respect of which it believes changes could be made in the draft articles adopted on first reading by the Commission:

- Reversal of the order of the text in subparagraphs (a) and (b) of article 2;
- Deletion of article 4, paragraph 2;
- Addition of the adverse effects of a use to the factors listed in article 6;
- Possible addition of a provision enumerating the ways of giving effect to the principle of equitable and reasonable use;
- De'etion of article 7;
- Introduction of a procedure allowing the watercourse State providing notification of a new activity to seek the objective opinion of an impartial third party as to whether the activity would be consistent with articles 5 or 7 (or only article 5) (article 15);
- Amendment of article 16 to include a provision that any State failing to respond to a notification within the prescribed period shall be presumed to have approved the planned use;
- Use of identical terms in articles 20 and 21 (either "environment" or "ecosystems");
- Restriction of the obligation to cooperate in the development of contingency plans, as provided in article 25, to the States actually threatened;
- Deletion of article 26; and
- Creation of binding arrangements for the peaceful settlement of disputes between States and of disputes involving individuals.

25/ Statement of 31 October 1990, RSDIE, vol. 1 (1991), pp. 530-531.

26/ Statement of 31 October 1991.